

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5744 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

J M SHAH

Versus

STATE OF GUJARAT

Appearance:

MR YN OZA for Petitioner

Ms Manisha Lavkumar AGP for Respondent No. 1

NOTICE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 17/08/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution the petitioner, a Superintending Engineer in the Irrigation Department of the State Government, has challenged the order dated 25.7.1986 passed by the State Government prematurely retiring the petitioner from service under Rule 161 of the Bombay Civil Service Rules,

1939.

2 The petitioner joined the State Government service as a Deputy Engineer in the year 1958. The petitioner was promoted to the post of Executive Engineer in the year 1971. On 1.7.1982 the petitioner was promoted to the post of Superintending Engineer. The impugned order of premature retirement was passed on 25.7.1986 (Annexure-A). It is the said decision which is under challenge in this petition.

3 Mr Y.N.Oza, learned counsel for the petitioner, has challenged the impugned order on the following grounds:-

- (i) In view of the provisions of clause (ii)(c) of sub-rule (2) of Rule 161, the Government had no power to retire Superintending Engineer after he completes 50 years of age and that there is no power to retire prematurely a Superintending Engineer.
- (ii) The petitioner was promoted to the post of Superintending Engineer on 1.7.1982 which promotion was granted to the petitioner on the basis of the criterion of proved merit and efficiency. Once the officer was thus found to be of proved merit and efficiency on 1.7.1982, the respondents could not have all of a sudden found the petitioner to be an officer who need not be retained in the service till he attains the age of 58 years, within a short period of four years thereafter.
- (iii) The respondents have relied upon certain material pertaining to the period prior to 1982. The same could not have been taken into account.
- (iv) The respondents have relied on the adverse remarks in the petitioner's confidential reports for the period between 1.4.1983 and 31.10.1985. However, many of these adverse remarks were communicated to the petitioner after a long delay and in respect of adverse remarks for two periods the petitioner's representations were pending on the date of issuance of order of compulsory retirement. The impugned order was, therefore, vitiated as the authorities could not have taken into account such adverse remarks against which representation were pending.

In support of the aforesaid contentions, the learned counsel for the petitioner has relied on various decisions viz. AIR 1976 SC 2076, 1981 All India Service Law General 788, AIR 1987 SC 948, (1989) 4 SCC 664 and XXXII (1) GLR 619.

4 On the other hand, learned AGP Ms Manisha Lavkumar has supported the impugned order on the basis of the averments made in the affidavit-in-reply and the decisions of the Apex Court in AIR 1992 SC 1020, AIR 1994 SC 1261 and AIR 1998 SC 1661. In the reply affidavit it is averred that the petitioner's case was reviewed as per the guidelines framed under Government Resolutions dated 25.10.1963 and the subsequent Government Resolutions amending the Resolution dated 25.10.1963 and the petitioner's performance for the 2-1/2 years was found to be average or below average. During the course of the service the petitioner had committed several serious irregularities and the penalty of withholding of increments was imposed on two occasions. Apart from the service record which was average or below average, charges for lack of integrity were also proved in the departmental inquiries. Even after the petitioner's promotion as Superintending Engineer there were adverse remarks in the petitioner's confidential reports for the following periods:-

01.04.1983 to 22.12.1983
23.12.1983 to 31.03.1984
01.04.1984 to 31.03.1985
01.04.1985 to 31.10.1985

5 The first contention urged on behalf of the petitioner is that the Government has no power to retire the petitioner prematurely. It is contended that Rule 161(C)(ii)(1) of the Bombay Civil Service Rules empowers the Government to retire the officers in the Bombay Engineers Service Class-I on reaching the age of 50 years if they have not attained the rank of Superintending Engineer and, therefore, the power for compulsory retirement was not at all available in the case of Superintending Engineers.

This contention cannot be accepted. The main part of Rule 161(1)(a), as it originally stood, empowered the appointing authority to retire the Government servant from service on the date on which he attained the age of 55 years or on any date thereafter. Hence, ordinarily, the power of compulsory retirement would not have been available to the Government in case of a government

servant in Bombay Engineers Service Class-I before the officer attained the age of 55 years. Clause (C)(ii)(1) gives additional power to the Government to retire an engineer in Class-I service on reaching the age of 50 years in case the officer has not attained the rank of Superintending Engineer. This clause, therefore, was not in substitution of main part of Rule 161 but was only an additional power conferred upon the Government. Even after amendment of Rule 161 by insertion of clause (aa) to sub-rule (1) of Rule 161 the Government classified the Civil Services into two categories and empowered the Government to exercise power of compulsory retirement. Here also the power is made available to the Government on or after the date the concerned Government servant attains the age of 50 years and hence, the age of 50 years is the starting point for the Government to exercise the power of compulsorily retiring a government servant.

6 As far as the second contention of Mr Oza is concerned, the argument is that the petitioner was promoted as a Superintending Engineer on 1.7.1982 and, therefore, the minor penalties imposed upon the petitioner for incidents prior to 1.7.1982 could not have been taken into consideration in view of the decision of the Apex Court in AIR 1987 SC 948.

However, the Government decision does not rest merely upon the orders of those minor penalties. As pointed out in the affidavit-in-reply, for almost four years after the petitioner's promotion to the post of Superintending Engineer, there were adverse remarks in the petitioner's confidential reports. Those relevant extracts are produced at Annexure-I to the affidavit-in-reply. For instance for the period from 1.4.1983 to 22.12.1983 it was reported that the petitioner was reluctant to assume responsibility and his capacity for organisation and to get the work from subordinates was inadequate. Similarly for the period from 1.4.1983 to 22.12.1983 the petitioner was reported to be reluctant and was slow in taking action against subordinates even for irregularities and even when lack of progress was brought to his notice. For the period from 23.12.1983 to 31.3.1984 also it was reported that the petitioner was not willing to take responsibility and the powers delegated were not exercised properly. The overall assessment was "an easy going officer, lacks application of mind regarding both administrative and technical matters." Again for the period from 23.12.1983 to 31.3.1984 the confidential reports contained the remarks to the effect that the petitioner was just

forwarding whatever was prepared by his subordinates without even studying them and that he was ill equipped for taking irrigation projects of the magintude of Narmada system and that he was not able to guide his subordinates. In the next year i.e. for the period 1.4.1984 to 31.3.1985 the reports indicated taht the petitioner lacked resourcefulness and was avoiding taking responsibility and was avoiding taking decisions. The petitioner was also reported "not exercising the powers delegated." Even in the next year i.e. for the period from 1.4.1985 to 31.3.1986 it was reported that the petitioner was "lethargic" and that he had "no interest to pick up the work, even where technical initiative and knowledge is required." His overall assessment was "below average officer." The petitioner was reported as "an easy going officer with poor capacity over subordinates, lacking initiative and evading responsibility."

In view of the above material on record, it can be easily said that on the basis of the confidential reports for the period even after the petitioner's promotion as Superintendeing Engineer on 1.7.1982, the Government was justified in retiring the petitioner prematurely.

7 The next contention of Mr Oza, the learned counsel for the petitioner is that the aforesaid adverse remarks could not have been relied upon as there was inordinate delay in communicating the aforesaid adverse remarks as will be apparent from the following details:-

 Period of Adverse Remarks Date of Communication

01.04.1983 - 22.12.1983	19-04-1986
23.12.1983 - 31.03.1984	10-09-1985
01.04.1984 - 31.03.1985	02.09.1985
01.04.1985 - 31.10.1985	07.07.1986

It is true that there was some delay in communication of the adverse remarks for the periods up to 31.3.1984 but the petitioner had made representations against the adverse remarks when communicated and those representations came to be rejected. The gravamen of the petitioner's challenge to the impugned decision is that in view of the delay in communicating the decision as well as the pendency of the representations against the adverse remarks for two periods, the entire decision to retire the petitioner prematurely was vitiated in view of the decision of the Apex Court in AIR 1979 SC 2076 and

AIR 1987 SC 948. The Court does not propose to deal with the aforesaid authorities for the simple reason that now the issue is concluded by the later decisions of the Hon'ble Supreme Court in AIR 1992 SC 1020, AIR 1994 SC 1261 and also in AIR 1998 SC 1661. In State of Punjab v. Gurdas Singh AIR 1998 SC 1661, after undertaking a review of all the previous decisions the Apex Court has held that before taking the decision to retire the government servant concerned prematurely, the authorities are required to consider the whole record of his service and adverse remarks prior to promotion and uncommunicated adverse remarks can also be taken into consideration. If as per the aforesaid legal position, uncommunicated adverse remarks can be taken into consideration, the delay in communicating the adverse remarks or the delay in disposal of representations against adverse remarks would obviously not vitiate the decision based on such adverse remarks when the representations were ultimately rejected. Hence, no further discussion is called for in this behalf.

8. In view of the above discussion, there is no merit in this petition and the petition deserves to be dismissed. The petition is accordingly dismissed. Rule is discharged with costs.
